



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 18, 2023

Bryant Henley
California Commission on Peace Officer
Standards and Training (POST)
860 Stillwater Road, Suite 100
West Sacramento, CA 95605

Re: Your Request for Advice
Our File No. A-23-158

Dear Mr. Henley:

This letter responds to your request for advice regarding the Political Reform Act (Act) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Sacramento County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

Under the Act and Section 1090, is a contract between the California Commission on Peace Officer Standards and Training (POST) and the University of California, San Diego (UCSD) invalid or otherwise adversely affected by the facts that: (1) a former POST employee (Former Employee) involved in creating and implementing the contract is now working on a UCSD board making recommendations to POST related to the contract; and (2) the former employee is reimbursed by UCSD for certain expenses related to the board position?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

No, UCSD is a state agency and the Act's "revolving door" provisions relating to post-governmental work do not apply when the Former Employee is working for another state agency. With respect to Section 1090, the reimbursement of an expenses by a governmental employer is a noninterest under Section 1091.5(a)(2). Accordingly, Section 1090 would not void the existing contract.

FACTS AS PRESENTED BY REQUESTER

POST is a state government agency, formed in 1959, to set minimum selection and training standards for California law enforcement. In 2021, POST's statutory obligations were expanded to include investigative and certification responsibilities with respect to the conduct of most peace officers who work in California.

Among the many training resources that POST offers is a program relating to law enforcement agency organizational wellness and resilience. At the end of 2022, POST entered into a contract with UCSD to develop a peace officer wellness program to support law enforcement professionals throughout the State of California. This program, which is known as the POST Officer Wellness and Resilience Program (POWR), is designed to provide officer wellness services that are specifically tailored to the needs of local agencies and their officers.

The POWR program, through the work of POST and UCSD, is currently in the process of reviewing local agency applications to participate in POWR. The process for selecting agencies to participate in the POWR program includes input from UCSD's Center for Integrative Medicine. In furtherance of this objective, UCSD created a board that will recommend to POST which local agency applicants POST should select to receive the POWR program's services and resources.

POST's Management Counseling and Projects Bureau (MCPB) spearheaded POST's efforts to create this program, and developed the contract with UCSD, to provide resources and services to local law enforcement agencies. A Former Employee who served as Bureau Chief for MCPB until June of this year supervised the Program Manager for this contract. The Former Employee was closely involved in both the creation of this contract, and its implementation through the first two quarters of 2023. The Former Employee resigned from POST in June of this year to pursue other private business opportunities. POST has been informed that the Former Employee has founded a business that offers services to law enforcement agencies, private businesses, and individuals seeking to enhance leadership competencies. The website for the business includes a list of California law enforcement agencies that have received training from the business.

It has recently come to your attention that, in addition to the Former Employee's private business engagements, UCSD recently selected him to serve as one of UCSD's board members responsible for helping POST select local agencies to receive POWR services from POST and UCSD under POST's contract. October 6, 2023 was the first scheduled meeting of this UCSD board. Although POST does not have all the relevant facts at this time, you have been advised that the Former Employee will not be compensated for his service on the board, but will receive reimbursement for certain expenses relating to his duties as a board member.

ANALYSIS

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the permanent and one-year bans. In addition, Section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment or have any arrangement concerning employment. (See Regulation 18747.) Colloquially, these provisions are known as the “revolving door” prohibitions. Permanent Ban

Section 87401—the Act’s permanent ban—provides:

A former state administrative official, after the termination of the official’s employment or term of office, shall not, for compensation, act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial, or other proceeding if both of the following apply:

- (a) The State of California is a party or has a direct and substantial interest; and
- (b) The proceeding is one in which the former state administrative official participated.

(Section 87401.)

Most relevant to determining whether the permanent ban applies in this scenario is the fact that UCSD is a part of the University of California school system, a state agency for purposes of the Act. (See, e.g., *Doyle* Advice Letter, No. A-23-144.) As noted above, while the permanent ban applies to prohibit former officials from representing certain parties in the same proceeding the officials previously participated in as state employees, the permanent ban does *not* apply when the former official is representing the State of California as an officer or employee. Accordingly, regardless of the terms of the reimbursement he receives from UCSD, the Former Employee’s work for UCSD does not violate the permanent ban.

One-Year Ban

The one-year ban prohibits a former state employee from making, for compensation, any formal or informal appearance or making any oral or written communication before his or her former agency for the purpose of influencing any administrative or legislative actions or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (Section 87406(d)(1); Regulation 18746.1.) However, similar to the permanent ban, the one-year ban does not apply to “[a]n officer or employee of another state agency, board, or commission if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board, or commission.” (Section 87406(e)(1).) Accordingly, as with the permanent ban, even if the Former Employee’s reimbursement from UCSD qualifies as “compensation,” the one-year ban

would not apply because he would be representing “another state agency, board, or commission” in this instance.

Influencing Prospective Employment

Section 87407 provides, “[a] public official shall not make, participate in making, or use the public official’s official position to influence, any governmental decision relating to any person with whom the public official is negotiating, or has any arrangement concerning, prospective employment.” However, we have not been provided with any facts indicating that the Former Employee took part in decisions with a potential financial effect on UCSD while negotiating employment with UCSD. Accordingly, there is no indication that the ban on influencing prospective employment applies based on the facts presented.

Section 1090

Under Section 1090, public officials “shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member.” Section 1090 is “concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.)

Under Section 1090, leaving state employment may not avoid a Section 1090 violation when the person has been involved in the contract process. In *City Council v. McKinley* (1978) 80 Cal. App.3d 204, 212, the court stated:

If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and affecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit or the intent of the law which precludes an officer from involving himself in the making of a contract.

Similarly, the Attorney General’s Office has opined that county employees could not propose an agreement for consulting services, then resign, and provide the proposed services (66 Ops.Cal.Atty.Gen. 156 (1983)) and a council member could not participate in the establishment of a loan program and then leave office and apply for a loan (81 Ops.Cal.Atty.Gen. 317 (1998).)

Section 1090 reaches beyond the officials who execute the contract and courts have broadly interpreted “participation in the making of a contract” when applying it:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the

questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

(*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Thus, “participation in the making of a contract” is defined broadly and includes any act involving the planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids. (*Millbrae Assn. for Residential Survival v. Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. Taft, supra*, at p. 569.)

Accordingly, Section 1090 may prohibit an official from taking a financial interest in a contract subsequently to participating in the making of the contract. However, Section 1090 will not apply where the official has not taken a financial interest in the contract. Here, based on the facts provided, the extent of the Former Employee’s interest in the contract between POST and UCSD is only the reimbursements he receives from UCSD for his expenses related to serving on UCSD’s board relating to the POWR program. The facts do not indicate the Former Employee has a financial interest in any of the recommendations made to POST or decisions made by POST. Under Section 1091.5, “[a]n officer or employee shall not be deemed interested in a contract [under Section 1090] if [their] interest is . . . [t]hat of an officer in being reimbursed for [their] actual and necessary expenses incurred in the performance of official duties.” (Section 1091.5(a)(2).)

So long as the Former Employee only receives reimbursement for expenses incurred in his capacity as a UCSD board member, the Former Employee has a noninterest in any contract between Post and UCSD under Section 1091.5(a)(2). Accordingly, based on the facts provided there is no indication of a Section 1090 violation that may potentially void the contract.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

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